



LeRay Jackson
Millard County Attorney
August 23, 2006

CONCEALED CARRY IMPLICATIONS IN COUNTY BUILDINGS OR FACILITIES

General Background

The possession of concealed firearms in the State of Utah is governed by Utah Code Ann. 53-5-701 through 711 and 76-10-504. Section 76-10-504(1)(b) criminalizes the concealed possession of a firearm without a valid concealed firearm permit. Such conduct is a class B misdemeanor if there is no ammunition in the firearm and a class A misdemeanor if there is ammunition in the firearm.

Section 53-5-704 outlines the conditions under which a person will be issued a concealed firearms permit. In general terms the criteria for a permit are as follows:

- (1) The division or its designated agent shall issue a permit to carry a concealed firearm for lawful self defense to an application who is 21 years of age or older within 60 days after receiving an application and upon proof that the person applying is of good character. The permit is for five years.
- (2) An applicant satisfactorily demonstrates good character if he/she:
 - (a) has not been convicted of a felony;
 - (b) has not been convicted of any crime of violence;
 - (c) has not been convicted of any offense involving the use of alcohol;
 - (d) has not been convicted of any offense involving the unlawful use of narcotics or other controlled substances;
 - (e) has not been convicted of any offense involving moral turpitude;
 - (f) has not been convicted of any offense involving domestic violence;
 - (g) has not be adjudicated by a court of a state or of the United States as mentally incompetent, unless the adjudication has been withdrawn or reversed; and
 - (h) is qualified to purchase and possess a dangerous weapon and

handgun under section 76-10-503 and federal law.

Concealed firearms permits shall be issued to anyone who has not been convicted of the disqualifying crimes. Unlike some other states, the Utah Department of Public Safety does not have discretion to deny a concealed weapons permit. The statutory language *requires* the issuance of the permit. This statutory language is arguably the most permissible, and liberal (from the standpoint of the gun-owner) in the country.

Background regarding Concealed Firearms and Employment

The carrying of concealed firearms, as it relates to employment, was addressed by the Utah Supreme Court in *Hansen v. America Online, Inc.*, 96 P.3d 950 (Utah 2004). In this case, America Online had an employment policy prohibiting the possession of firearms on company property. Three at-will employees, who acknowledged they were aware of this policy, moved firearms from one vehicle to another while in America Online's leased parking lot. The employees were terminated for violating the no firearms policy. In response the employees sued America Online for wrongful termination. On appeal, the Utah Supreme Court upheld the termination as lawful under the at-will employee doctrine. The Supreme Court weighed the public policy of personal firearms possession in the State of Utah against the at-will employee doctrine, and decided the right to bear arms does not overcome the at-will employee doctrine. As a result, a private employer in the end may instigate a policy of no possession of firearms in the workplace and terminate employees who violate this policy.

One would argue therefore, that as an employer a government entity may also exercise this right to adopt a no firearms policy and terminate pursuant thereto. Unfortunately, this is not the case.

Laws Governing Government Interference with Firearms Possession

A few years ago, there was major litigation regarding whether or not the University of Utah could lawfully prohibit, by policy, the possession of firearms on school grounds. In response to this issue, a new section regarding firearms laws was established in Utah Code Ann. §63-98-102. Prior to this statute going into effect, firearms laws were governed by Article I, Section 6 of the Utah State Constitution and Utah Code Ann. §76-10-500. They state the following:

Utah State Constitution, Article I, Section 6.

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

Utah Code Ann. §76-10-500.

- (1) The individual right to keep and bear arms being a constitutionally protected right, the Legislature finds the need to provide uniform laws throughout the state. Except as specifically provided by state law, a citizen of the United States or a lawfully admitted alien shall not be:
 - (a) prohibited from owning, possessing, purchasing, selling, transferring, transporting, or keeping any firearm at his place of residence, property, business, or in any vehicle lawfully in his possession or lawfully under his control; or
 - (b) required to have a permit or license to purchase, own, possess, transport, or keep a firearm.
- (2) This part is uniformly applicable throughout this state and in all its political subdivisions and municipalities. All authority to regulate firearms shall be reserved to the state except where the Legislature specifically delegates responsibility to local authorities or state entities. Unless specifically authorized by the Legislature by statute, a local authority may not enact or enforce any ordinance, regulation, or rule pertaining to firearms.

The prohibition against local authorities making rules or ordinances regarding firearms was already very strict. As shown in  76-10-500 (2)A local authority may not enact or enforce **any** ordinance, regulation, or rule pertaining to firearms.  (emphasis added). This statutory pronouncement is unambiguous and equally rigid in its pronouncement. However, the prohibition against local rule making regarding firearms was augmented by Utah Code Ann.  63-98-102. It states the following:

- (1) The individual right to keep and bear arms being a constitutionally protected right under Article I, Section 6 of the Utah Constitution, the Legislature finds the need to provide uniform civil and criminal firearm laws throughout the state.
- (2) Except as specifically provided by state law, a local authority or state entity may not:
 - (a) prohibit an individual from owning, possessing, purchasing, selling, transferring, transporting, or keeping a firearm at the individual's place of residence, property, business, or in any vehicle lawfully in the individual's possession or lawfully under the individual's control; or
 - (b) require an individual to have a permit or license to purchase, own, possess, transport, or keep a firearm.

- (3) In conjunction with Title 76, Chapter 10, Part 5, Weapons, this section is uniformly applicable throughout this state and in all its political subdivisions and municipalities.
- (4) All authority to regulate firearms is reserved to the state except where the Legislature specifically delegates responsibility to local authorities or state entities.
- (5) Unless specifically authorized by the Legislature by statute, a local authority or state entity may not enact, establish, or enforce any ordinance, regulation, rule, or policy pertaining to firearms that in any way inhibits or restricts the possession or use of firearms on either public or private property (emphasis added).
- (6) As used in this section:
 - (a) "firearm" has the same meaning as defined in Subsection 76-10-501(9); and
 - (b) "local authority or state entity" includes public school districts, public schools, and state institutions of higher education.
- (7) Nothing in this section restricts or expands private property rights.

Id. As can be seen,  63-98-102 repeats a great deal of the language that is already contained in  76-10-500. However, the addition is that  63-98-102 also prohibits any ***Apolicy*** pertaining to firearms that in any way inhibits or restricts the possession or use of firearms.  U.C.A.  63-98-102 (emphasis added). As a result, a government entity may not, under any circumstances, establish a rule, ordinance, or policy that is going to restrict possession of a firearm. Note that Alocal authority and state entity  in U.C.A.  63-98-102, specifically includes schools and colleges. Note: This is obviously the legislature=s way of showing the University of Utah who truly has the power and final say in matters of State policy.

So where does this leave governmental entities that serve a dual role in this debate, i.e. as governmental entities governed by the firearms laws as elucidated in U.C.A.  63-98-102 &  76-10-500, and as employers arguably entitled to act as AOL in the *Hansen v. AOL* case? Herein is the question to which there is no clear cut answer that either the legislature or the courts have ruled on.

More than likely, even though government entities are employers, the strong and unambiguous pronouncements in the firearms laws, quoted above, override a government entity=s right to act like a private employer with regard to regulating firearms possession by employees. This conclusion is supported by the following:

First, the language of the statutes makes it clear that any legislative action, including a policy, is prohibited so long as it restricts or inhibits in any way a person's right to possess a firearm on private or **public** property, which obviously includes government offices and buildings.

Furthermore, the authority to govern firearms laws is specifically reserved to the State of Utah. Under this pronouncement it seems clear that even if a local entity wanted to make such a law or policy, it would be outside of the entity's legal authority to do so.

Finally, given the reason for the most recent legislation, i.e. the dispute between the University of Utah and the State Legislature, and the plain meaning of the statute, it seems the logical conclusion that government entities may not under any circumstances enact any legislative pronouncement or policy that restricts firearms possession so long as such possession is in accordance with State law.

Liability

The question obviously arises, if a governmental entity cannot prohibit firearms possession in the workplace, what liability attaches to the government entity regarding the use of firearms in the workplace. The simple and quick answer to this question is none. In order to understand why, I must refer you to the Utah Worker's Compensation Act and the Utah Governmental Immunity Act. Under and in conjunction with both, governmental entities are not subject to liability for either negligent acts or for intentional acts relating to firearms.

The Utah Worker's Compensation Act, found in U.C.A. §34A-2-105, states the following:

- (1) The right to recover compensation pursuant to this chapter for injuries sustained by an employee, whether resulting in death or not, ***shall be the exclusive remedy*** against the employer and shall be the exclusive remedy against any officer, agent, or employee of the employer and the liabilities of the employer imposed by this chapter shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to the employee or to the employee's spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated, or incurred by the employee in the course of or because of or arising out of the employee's employment, and no action at law may be maintained against an employer or against any officer, agent, or employee of the employer based upon any accident, injury, or death of an employee. Nothing in this section, however, shall prevent an employee, or the employee's dependents, from filing a claim for compensation in those cases in accordance with Chapter 3, Utah Occupational Disease Act. (emphasis added)

As can be seen from the plain language, an employee who is injured at work may only seek redress and compensation from the Worker=s Compensation Fund. Any private cause of action against the employer is pre-empted by this legislative enactment with regard to all acts involving negligence. See *Sheppick v. Albertson=s Inc.*, 922 P.2d 769 (Utah 1996) and *Lantz v. National Semiconductor Corp.*, 775 P.2d 937 (Utah App. 1989). In both of these cases, employers were exempted from liability beyond that in the Worker=s Compensation Act because of the Aexclusive remedy language highlighted above. While private causes of action were still available against the individual who caused the tort, the employer was protected.

In my research, the only way that an employer is not exempted under the above act, is if the employer acted intentionally as opposed to negligently. In such a case, liability may attach if the plaintiff can show that the employer acted with Aan actual deliberate intent to injure him.= *Lantz*, 775 P.2d at 940. However, as will be shown below, such liability will not attach to a governmental entity.

This above law must now be examined in light of the Utah Governmental Immunity Act. As I=m sure your aware, a governmental entity may not be a party to a legal cause of action unless sovereign immunity is specifically waived by statute. See Utah Code Ann. =63-30d-201 (stating that Aexcept as may be otherwise provided in this chapter, each governmental entity and each employee of a governmental entity are immune from suit for any injury that results from the exercise of a governmental function.=).

It is important to note that actions regarding firearms are **not** waived, and as a result governmental entities are immune from liability. This immunity is contained in Utah Code Ann. =63-30d-301. In this section, the Utah Legislature provides for when immunity is waived and suit is permitted. It is important to note that immunity from suits based upon simple negligence of a government actor are not waived. Also immunity regarding suits that Aarise[] out of, in connection with, or result[] from... assault, battery, [or] false imprisonment= are specifically not waived. *Id.*

The above recitation may seem a bit disjointed. For this reason, I have provided a series of hypothetical situations that cover the various classes of potential torts regarding firearms, and who would be liable or not under each.

Hypothetical Situations

Situation #1: Suppose that while at work a government employee having a permit was carrying a concealed firearm, and accidentally drops the firearm causing it to discharge. The bullet then hits another government employee causing injury or death. Who is liable and what is the remedy?

Answer #1: This situation is clearly governed by the Utah Worker=s Compensation Act. The injured employee may not under the Act maintain a private cause of action against the employer because of the Aexclusive remedy=

language in the Act. The injured employee may obtain relief from the Worker=s Compensation Fund for the injuries. However, the injured employee may sue the negligent employee in his personal capacity for his negligent act.

Situation #2: Suppose the facts in Situation #1, but instead of injuring another government employee, the bullet injures a civilian who happens to be at the employer=s place of business. Who is liable and what is the remedy?

Answer #2: In this situation, the negligent employee would again be liable in his personal capacity for the negligent act. However, the governmental employer is again without liability. This is because the Utah Governmental Immunity Act has not waived immunity as it applies to negligent actions of its employees. As a result, the governmental entity would be protected from suit by sovereign immunity.

Situation #3: Suppose that while at work a governmental employee, who was carrying a firearm, for some reason decides to draw his firearm and intentionally shoot and kill another governmental employee. Also suppose that this act was done without the command or behest of the government employer. Who is liable and what is the remedy?

Answer #3: In this situation the individual actor is obviously personally liable for criminal murder and wrongful death. However, the employer is again not liable. There may be damages assessed under the Worker=s Compensation Fund but no private cause of action will lie against the employer. This is because the Utah Governmental Immunity Act specifically does **not** waive immunity if the injury (including death) Aarises out of, in connection with, or results from: . . . assault, [or] battery.≡ U.C.A.  63-30d-301(5).

Situation #4: Suppose a similar situation above, but this time the governmental employee takes several civilians hostage at a governmental building and kills several. Who is liable and what is the remedy?

Answer #4: Just as in situation three the employer is not liable. The governmental immunity will again protect the government entity because the Utah Governmental Immunity Act specifically does **not** waive immunity if the injury (including death) Aarises out of, in connection with, or results from: . . . assault, battery, [or] false imprisonment.≡ U.C.A.  63-30d-301(5). See also *Tiede v. State*, 915 P.2d 500 (Utah 1996) for extensive treatment of this issue.

Can Local Government Entities Do Anything on This Subject?

The question then arises, what if anything can a local governmental entity do with regards to firearms in the workplace. The operative prohibition in the statute prohibits the making of policy or ordinance that in any way inhibits or restricts the possession or use of firearms on either public or private property.≡ U.C.A. §63-98-102(5). In the end, the question would be whether the proposed policy inhibits or restricts possession or use of a firearm? If the answer is no, then the policy or ordinance is permissible. If the answer is yes, then the policy or ordinance is impermissible. I think it important to note that if it is a close call, it is likely that the policy or ordinance would be impermissible under the statute, given the tenor of the legislative enactments above.

As can be seen from these examples, there is no liability for the governmental entity whatsoever if an employee is carrying a gun and something happens. However, I personally struggle with the results of my research. I really wonder if it might be prudent for a government employer to require those employees who carry a concealed weapon (pursuant to a valid permit) to the workplace to so inform the governmental employer. Then those who carry such weapons to work might be required to attend some sort of training provided by the employer. If it were determined that requiring such employees to disclose that they are carrying a weapon to work is illegal, (this is probably how a Utah court would rule), then a blanket training course for all government employees would be recommended. See McElhaney, Aggression in the Workplace≡, which has been distributed by UCIP to its members, for suggestions on how to train, or attempt to train, a loose cannon≡ employee who has a permit and insists on carrying a concealed weapon at work for a governmental employer.